THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 05.11.2007

+ **ARB. P. 283/2006**

M/S KAMAL KUMAR JAIN ... Petitioner

- versus -

M/S DLF POWER LIMITED & ANR ... Respondent

Advocates who appeared in this case:
For the Petitioner : Mr Ujjwal Jha
For the Respondents : Mr Anil Sharma with Mr N. Menon and Mr R. Mishra

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED

1. Whether Reporters of local papers may be allowed to see the judgment ? Yes

2. To be referred to the Reporter or not ? Yes

3. Whether the judgment should be reported in Digest ? Yes

BADAR DURREZ AHMED, J(ORAL)

1. This petition is under Section 11 (6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the said Act') for appointment of the sole arbitrator for adjudication of the disputes between the petitioner and the respondent as set out in paragraph 7 of the petition. The learned counsel for the respondent submits that there are no arbitrable disputes between the parties and, therefore, there is no question of appointment of an arbitrator and/ or invocation of the

provisions of Section 11(6) of the said Act. He submitted that a meeting was held between the petitioner and the respondents on 10.04.2003 to enable the parties to reconcile the accounts between them and to review all the bills submitted by the petitioner to the respondents for all the orders placed by the respondents on the petitioner in respect of the respondents' projects at Rajrappa, Gidi and Madhuband. The minutes of the meeting, which have been placed as Annexure C to the petition, indicate that after discussion it was mutually agreed that the respondents will pay to the petitioner an amount of Rs 56 lacs towards various works executed by the petitioner against all of the respondents' orders for civil, mechanical, piping and related jobs till date for the said projects. It was also agreed between the parties that the said amount of Rs 56 lacs is by way of full and final settlement against all of the balance invoices raised by the petitioner on the respondents till that date. The minutes also indicated that the amount of Rs 56 lacs was to be paid in three instalments. The first instalment of Rs 20 lacs was to be paid by the end of April, 2003, the second instalment of Rs 20 lacs by the end of May, 2003 and the last instalment of Rs 16 lacs by the end of June, 2003.

2. The learned counsel for the respondents submitted that although the matter had been finally settled, an amount of Rs 7 lacs remained to be paid. A notice was issued by the petitioner to the respondents on 27.09.2004 wherein the payment of Rs 49 lacs is admitted. Pursuant to this, a further meeting took place between the petitioner and the respondents on 12.10.2004. This meeting was held with reference to the earlier meeting on 10.04.2003 and the petitioner's request for immediate payment of the balance amount of Rs 7 lacs as well as in respect of the amounts payable by the respondents to the petitioner concerning other works which included civil works for coal sheds carried out by the petitioner for the respondents at the said sites. The minutes of the meeting of 12.10.2004 have been placed as Annexure F to the petition and they reveal that after discussion it had been mutually agreed that the respondents would release the balance amount of Rs 7 lacs and also a further sum of Rs 18,41,953/- in respect of the civil works for the coal sheds. It was agreed that the sum of Rs 7 lacs towards the balance amount in respect of the meeting dated 10.04.2003, would be released by a cheque No. 914357 dated 16.10.2004. The other amount of Rs 18,41,953/- payable in respect of the civil works for coal sheds was agreed to be released by the respondents by three separate

cheques for Rs 6,00,000/-, Rs 5,41,953/- and Rs 7,00,000/- by cheques dated 15.11.2004, 15.12.2004 and 15.01.2005 respectively. It was also noted in the minutes of the said meeting that the said arrangement was by way of full and final settlement of all invoices raised by the petitioner on the respondents till date against all purchases/ work orders placed by the respondent on the petitioner. It was also agreed that the petitioner would not raise any other claim on the respondents for any other dues and that the minutes of 12.10.2004 superseded all letters / claims etc. raised by either party on the other. Significantly, the petitioner had also agreed to withdraw the legal notice dated 27.09.2004 and that the same be treated as null and void. Consequent to the said arrangement arrived at in the said minutes of 12.10.2004, the entire payment has been made and received by the petitioner on the dates indicated above.

3. In this background, the learned counsel for the respondents submitted that the entire disputes stood resolved by the said minutes of 12.10.2004 which have also been agreed upon by the parties and, therefore, there does not exist any arbitrable dispute for which appointment of an arbitrator is necessary. The learned counsel for the respondents placed reliance on the decision of the Supreme Court in the

case of ***Nithani Steels Ltd. v. Associated Constructions: 1995 Supp (3) SCC 324.***

4. The learned counsel for the petitioner submitted that while it is true that meetings took place between the parties on 10.04.2003 and 12.10.2004, the minutes of the meeting of 12.10.2004 were prepared by the respondents and the petitioner was made to sign the same under coercion and under duress. Therefore, it was submitted by the learned counsel for the petitioner that the same cannot be acted upon and consequently there are disputes pending between the petitioner and the respondents. He submitted that by virtue of the notice dated 27.09.2004, a demand of approximately Rs 96 lacs was made on the respondents and this in itself would indicate that the settlement for an amount of Rs 56 lacs could only have been obtained under duress and coercion. In respect of the balance claim of Rs 19.64 lacs mentioned in the letter dated 27.09.2004, the respondent had agreed to a sum of Rs 18,41,953/-. The learned counsel for the petitioner submitted that the original agreement arrived at in the meeting of 10.04.2003 was not adhered to by the respondent inasmuch as amount of Rs 7 lacs was admittedly due and payable even beyond the schedule prescribed under the said minutes.

According to the learned counsel for the petitioner this clearly indicates that there are disputes which still exist between the petitioner and the respondent and for this reason the appointment of an arbitrator would be necessary. He placed reliance on the decision of the Supreme Court in the case of ***Shree Ram Mills Ltd. v. Utility Premises (P) Ltd. : 2007 (1) Arb. LR 517 (SC)***.

5. After having heard the arguments advanced by the counsel for the parties, I may straightaway say that I am in agreement with the submissions made by the counsel for the respondent that as of now there are no arbitral disputes pending between the parties. They had fully and finally settled their disputes by virtue of the meeting of 12.10.2004, the substance of which is recorded in the form of the minutes which have been referred to above. The decision in the case of ***Nathani Steels Ltd.*** *(supra)* would be squarely applicable to the present case. In that decision the parties had fully and finally settled amongst themselves and the settlement was also reduced to writing. The said settlement had also been signed by the parties. The only issue raised there was that a calculation mistake had crept in with regard to the amount in question which had been mentioned in the settlement agreement and it was for

this purpose that the arbitration agreement was sought to be invoked. The Supreme Court after considering its earlier decisions in the cases of ***P. K. Ramaiah and Co. v. Chairman & Managing Director, National Thermal Poer Corpn.: 1994 (3) SCC 126*** and ***State of Maharashtra v. Nav Bharat Builders: 1994 Supp (3) SCC 83*** came to the conclusion that after there was a full and final settlement amongst the parties, there was no scope for raising an issue with regard to there being any arbitrable disputes surviving the said settlement. The Supreme Court, referring to the facts of the case before it, observed that once the parties had arrived at a settlement in respect of any dispute or difference arising under a contract and that dispute or difference is amicably settled by way of a final settlement by and between the parties, then, unless that settlement is set aside in proper proceedings, it cannot lie in the mouth of one of the parties to the settlement to spurn it on the ground that it was a mistake and proceed to invoke the Arbitration clause. The Supreme Court observed that if this is permitted the sanctity of a contract, the settlement also being a contract, would be wholly lost and it would be open to one party to take the benefit under the settlement and then to question the same on the ground of mistake without having the settlement set aside. The Supreme Court finally observed:-

> "In the circumstances, we think that in the instant case since the dispute or difference was finally settled and payments were made as per the settlement, it was not open to the respondent unilaterally to treat the settlement as non est and proceed to invoke the Arbitration clause. We are, therefore, of the opinion that the High Court was wrong in the view that it took."

6. The decision in ***Shree Ram Mills Ltd.*** *(supra)* cited on behalf of the petitioner would not be of any assistance to the petitioner. In that decision, the earlier decision in ***Nathani Steels Ltd.*** *(supra)* was noticed and the facts in ***Shree Ram Mills Ltd.*** *(supra)* were distinguished from the facts obtaining in ***Nathani Steels Ltd.*** *(supra)*. This would be apparent from the following observation:-

> "Though the observations at the first blush appear to be in favour of the appellants, on the closer look they are not so. This was a case where in a contract the parties had amicably settled their disputes and the parties also did not dispute that the they have arrived at such a settlement. It is under those circumstances that the observations were made. However, we do not think that the facts in the present case suggest that there was a full and final settlement in between the parties in respect of the issue regarding 1,20,000 sq.ft. of FSI and that a MoU was signed wherein the respondent and Bhupendra Capital and Finance Limited who was the party to the third agreement, acknowledged that they were left with rights limited to 86,725 sq.ft. of FSI. It must be seen that there is no reference whatsoever to any consideration as regards the 1,20,000 sq.ft. of FSI, much less to the figure of Rs. 1.20 crores in this MoU. As to what would be the effect of this MoU on the rights of the respondent herein would not be for us to go into but it is certain that the

> issue had not been settled completely. In ***Nathani's case*** (supra) the issue was admittedly settled and that was not disputed by the parties thereto. Here the parties and more particularly the respondents are seriously disputing that the issue regarding 1,20,000 sq.ft. of FSI was finally settled in between the parties. It would be only for the Arbitral Tribunal to decide the effect of the respondent having signed the MoU. We have pointed out earlier that this MoU cannot be said to be in the nature of a contract. In ***Nathani's case*** the settlement was viewed as a contract and it was, therefore, reiterated that if the parties are allowed to wriggle out of their obligation from the contract, no sanctity would be left to the settlement which are in the nature of a contract. It is for this reason that, in our opinion, the decision in ***Nathani's case*** is not applicable to the present facts. We also reiterate at this juncture that the cloud on 2500 sq. mtrs. of land which is inexplicably connected with the FSI of 1,20,000 sq. ft. created by the undertaking given before the Delhi High Court still remains looming large and remained so even on the date of the MoU. It is for this reason also that we are of the clear opinion that there was no final settlement of the issue regarding 1,20,000 sq.ft. of FSI even by the MoU dated 19.1.2005. If that was so, it is clear that there was live issue in between the parties and the parties were at loggerheads on that issue."

The facts of the present case are that the parties had entered into a settlement on 10.04.2003. It was agreed that the respondents would pay a sum of Rs 56 lacs to the petitioner in the full and final settlement thereof. The petitioner has not contended that this settlement was obtained under duress or coercion. As such the amount of Rs 56 lacs payable under the contract in question stood crystallized. The issue

remaining was whether the balance sum of Rs 7 lacs was payable or not. That issue was settled by the second meeting of 12.10.2004 where the respondent agreed to pay the same by a cheque dated 16.10.2004 itself. The said amount also stood paid. Therefore, in my view, it cannot be contended by the petitioner that the settlement of 12.10.2004 qua the contract in question was obtained under duress or coercion. Apart from this it must also be noted that the meeting did take place on 12.10.2004 and that the minutes were signed on that date itself by the parties. Had there been any coercion or duress, it was incumbent upon the petitioner to have taken objection to it at the earliest opportunity. The petitioner only raised an objection for the first time on 30.03.2005 by way of a protest letter which was also duly replied to by the respondents on 21.04.2005. It is noteworthy that the protest that was raised by the petitioner was after approximately 2-1/2 months of having received the entire payment under the agreement / settlement arrived at between the parties on 12.10.2004. The last of the payments under the said agreement was to have been made on 15.01.2005 and which was admittedly made on that date. Therefore, apart from the fact that the petitioner cannot raise a dispute without having the memorandum set aside in an appropriate proceeding, it is more than clear that the action

on the part of the petitioner is a mere afterthought.

7. Consequently, I hold that there is no arbitrable dispute pending between the parties as a result of which this petition has to fail. It is dismissed. No order as to costs.

BADAR DURREZ AHMED
(JUDGE)

November 05, 2007
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